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Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

RON J. STEELE and TERRY KNAPP,
individually and as representatives of the class,

Petitioners,

v.

THE CITY OF WALLA WALLA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 1, 1997

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QUESTIONS PRESENTED

1. Whether the appellate court erred by sua sponte applying the rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1994) (hereinafter "*Heck*"))), to the plaintiffs' §1983 claims where the complaint alleged that the plaintiffs and class members had been tried by an illegal, municipal court of limited jurisdiction?

2. Whether the rule announced in *Heck* applies equally to the §1983 claims (a) of those who paid civil penalties and fines for non-criminal traffic, parking and city code violations, (b) of those who were acquitted of city ordinance violations, (c) of those who paid fines or other penalties for misdemeanor ordinance violations, and (d) of those who were jailed for city ordinance violations, all on account of proceedings in an illegal, municipal court of limited jurisdiction?

PARTIES

The caption of the case contains the names of all parties to the proceeding: Ron J. Steele, Terry Knapp and the City of Walla Walla.

Page

TABLE OF CONTENTS

Questions Presented i

Parties ii

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 1

Statement Of The Case 2

The Ninth Circuit Decision 4

Reasons For Granting The Petition 4

Argument:

I. Trial By An Illegal Court Is A Trespass Under Ancient English And American Law 5

II. Proceedings In An Illegal Municipal Court Do Not Lie At The "Intersection Of §1983 And Federal Habeas Relief 9

III. The Allegations Of Fraud In The Complaint Bring It Within The Exceptions Enumerated By Justice Scalia 11

IV. Where There Are No Criminal Judgments, There Can Be No Application Of *Heck* 12

V. Persons Acquitted Of Charges In The Court Of Limited Jurisdiction Challenged Herein Should Be Allowed To Proceed In Their Action Against The Respondent 13

VI. Payment Of Fines For Misdemeanor Offenses, Not Resulting In Confinement (Jail), Does Not Preclude A Claim Under *Heck* 14

Page

VII. Class Members Jailed For City Ordinance Violations Do Not Lose Their Right To Sue For Damages Under §1983 As A Result Of *Heck* 16

Conclusion 16

Appendices:

Appendix A – Judgment of the Ninth Circuit Court of Appeals below. 1a

Appendix B – Order of Ninth Circuit Court Denying Motion For Rehearing. 3a

Appendix C – Petitioners' Complaint filed in U.S. District Court 4a

Appendix D – U.S. District Court Order dismissing complaint with prejudice 14a

TABLE OF AUTHORITIES

Federal Cases:

Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 20 L.Ed. 646 (1871) 8

Burnham v. Superior Court of California, 495 U.S. 604 (1990) 13

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 10

Dynes v. Hoover, 61 U.S. 838 (1857) 7

Heck v. Humphrey, 512 U.S. 477 (1994) ..... *passim*

Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982) 14

Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932) 8

Federal Cases, continued: Page

McClaughrey v. Deming, 186 U.S. 49 (1902) 8

Mosely v. Wilson, 102 F.3d 85 (3rd Cir. 1996) 12

Parke v. Raley, 506 U.S. 20, 29 (1992) 15

Runkle v. U.S., 122 U.S. 543 (1887) 7, 15

Russell v. Pierre, 530 F.2d 791 (8th Cir. 1976), *cert. denied,* 429 U.S. 855 (1976) 11

Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957) 8

Valley Wood Preserving v. Paul, 785 F.2d 751 (9th Cir. 1986) 15

Wise v. Withers, 9 Cranch. [331,] 337 [(1806)] 7

Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976) *cert. den,* 434 U.S. 825 (1977) 11

State Cases:

In re Cloherty, 2 Wash. 137, 27 P. 1064 (1891) 6

Confederated Tribes of the Colville v. Washington, 938 F.2d 146 (9th Cir. 1991) 12

Cox v. Perkins, 299 Ky. 470, 185 S.W. 954, 173 A.L.R. 797 (1945) 8

In re Eng, 113 Wn.2d 178, 776 P.2d 1336 (1989) 6

Fondren v. Klickitat County, 79 Wash. App. 850 (1995) 8

Junkin v. Anderson, 12 Wn.2d 58, 120 P.2d 548 (1941) 15

State Cases, continued: Page

North Pacific Plywood, Inc. v. Access Road Builders, Inc., 29 Wash. App. 228, 628 P.2d 482 (1981), review denied, 96 Wash. 2d 1002 (1981) 12

State v. Canady, 116 Wn.2d 853, 857, 809 P.2d 203 (1991) 6

State ex rel. McFerran v. Justice Court of Starr, 32 Wn.2d 544, 202 P.2d 927 (1949) 15

State v. Moore, 73 Wash. App. 805, 871 P.2d 1086 (1994) 6

Federal Statutes:

28 U.S.C. §1254(1) 1

28 U.S.C. §1343, §2201, §2202 2

28 U.S.C. §2254(b) 9

42 U.S.C. §1983 ..... *passim*

Fed. R. Civ. P. 11 3

State Statutes:

RCW 46.63.010-020 ..... 10, 12

RCW 3.46.020 10

Miscellaneous:

Bouvier's Law Dictionary, 1870 ed., v. II 6, 7, 9, 16

OPINIONS BELOW

The disposition of the United States Court of Appeals for the Ninth Circuit in this case was found "not appropriate for publication" and is therefore not reported. It appears as Appendix A to this Petition.

The Opinion and Order of the United States District Court for the Eastern District of Washington is not reported. It appears as Appendix D to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1997. On July 3, 1997, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* (Appendix B). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. §1983, which states:

"Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983 (1994).

STATEMENT OF THE CASE

The Complaint (Appendix C) alleges that the Respondent operated a municipal court since 1976 without obtaining legal authority to do so. Washington State statutes and case law are clear: (a) on the procedure for creating a municipal court, (b) that failure to follow the procedure means the court and its acts are invalid, (c) that Washington cities have no inherent judicial power, and (d) that the jurisdiction of municipal courts is limited to enforcing municipal ordinances, i.e., they are courts of limited jurisdiction.

Mr. Steele and Mr. Knapp – and the class members they seek to represent – have been summoned, charged and tried by the Respondent for ordinance violations. These include parking, traffic, and other civil infractions, as well as misdemeanor violations. The Respondent acquitted the Petitioners of some charges and convicted them of others, i.e., Ron Steele was acquitted of one parking violation but convicted of another. The Respondent has charged Terry Knapp with 55 ordinance violations over the years but subsequently dismissed 23 of the charges.

Discovery, ignored by both courts below, produced several affidavits reflecting that some – but not all – statutory procedures for creating the court had been undertaken. It also produced findings and orders of three different municipal judges since 1987 who, during the long public wrangle over the legitimacy of the court, agreed that the court had not been properly created in 1976 but disagreed about what that ultimately meant.

Claiming federal jurisdiction under 28 U.S.C. §1343, §2201 and §2202, 42 U.S.C. §1983, the Complaint prayed for (1) a declaration that the court was illegal,

(2) injunctive relief against further operation of the court and (3) monetary damages for violation of Petitioners' constitutional rights.

The parties filed cross motions for summary judgment in the District Court. Without referencing any discovery, the District Court found that the plaintiffs had not explained how the defendant had "caused the court not to be created", thus it could not be responsible for any "due process" violations. Therefore the District Court ruled that it had no jurisdiction, ordered the Complaint dismissed "with prejudice" and issued show cause orders to sanction Petitioners and their attorney with fees, costs and suspension of his license under Fed.R.Civ.P. 11.

The Petitioners had been of the view that what caused the court to not "be created" was irrelevant. Rather, by operating an illegal court, the defendant violated their constitutional rights. However, during oral argument on appeal, the Circuit Court asked the parties, sua sponte, if they were aware of *Heck v. Humphrey,* 512 U.S. 477 (1994) (hereinafter "*Heck*"). Before this moment, no one had raised *Heck.*

The Petitioners answered that *Heck* did not apply because trial by an illegal court was a "trespass" under historic Supreme Court doctrine (not a "malicious prosecution"), that their claim had nothing to do with the prosecution or outcome of any individual case, but rather with the legitimacy of the municipal court itself, and that *Heck* did not apply because, where no court existed, there could not be a "judgment" to be reversed, a la *Heck.* In addition, having anticipated a *Heck* defense, the Complaint alleged the existence of fraud on the part of the Respondent.

THE NINTH CIRCUIT DECISION

Without explaining why *Heck* applies to civil infractions or even to acquittals, the Circuit Court dismissed the appeal on May 14, 1997, "in accordance with the rule set forth in" *Heck*. Also, without explanation, the Court directed that it's disposition not be published or cited. The Petitioners moved for rehearing, with a suggestion of en banc review, both of which were denied on July 3, 1997. This Petition ensued.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit departs from the rulings of the United States Supreme Court in regard to *Heck v. Humphrey,* 512 U.S. 477 (1994), from each of the opinions in *Heck* itself, and from every decision of any other circuit pertinent to the application of *Heck* in these circumstances.

In addition, the Ninth Circuit's uncitable decision, dismissing, sua sponte for failure to state a cause of action via *Heck* so far departs from the accepted and usual course of judicial proceedings, and at the same time sanctions such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

Last, the Ninth Circuit decision decides important questions of federal law in a way that conflict with *Heck*: it applies *Heck* to all municipal ordinance violations, including civil infractions, and even to defendants who were acquitted. Federal habeas relief is not or was not available in most of these situations; and challenges against illegal courts have been held to be a trespass, not malicious prosecution, by this Court consistently

for nearly two hundred years. While the relevant decisions concerning *Heck* do not support the Ninth Circuit decision, the question of applying *Heck* in this type of case has not been, but should be, settled by this Court.

ARGUMENT

I.

TRIAL BY AN ILLEGAL COURT IS A TRESPASS UNDER ANCIENT ENGLISH AND AMERICAN LAW.

The Petitioners' Complaint states that:

> "2. The purpose of this complaint is to obtain a declaration that the purported court of limited jurisdiction that has been and continues to be operated by the Defendant is not and has not been a court since July, 1976; and is void, non-existent, fraudulent, a nullity and a trespasser; . . ."

The Petitioners then alleged:

> "9. In 1975, the City of Walla Walla petitioned the County of Walla Walla to amend the existing Justice Court Districting Plan to create a municipal department of the Walla Walla Justice District Court, a matter solely within the County's, not the City's, jurisdiction. . . . the [pertinent] statute required that the County undertake specific procedural steps . . . and then take substantive, official action before the Plan could or would be amended and the municipal department be thereby created. . . . However, the County never undertook or provided such mandatory hearings, notice to the public and especially never took any action or vote whatsoever approving or authorizing an amendment to the [Plan] or the creation of any additional court of municipal department . . ."

Paragraph 10 of the Complaint then says:

> "10. In spite of the failure and/or refusal of the County to grant in any way the Defendant's petition or to amend the [Plan] so as to create a municipal department, the Defendant commenced, ultra vires, to operate a purported but sham, illegimate and fraudulent municipal court . . . in July, 1976."

Washington State case law consistently has held that noncompliance with statutory procedures for creation of a municipal court renders the court and its acts invalid. *State v. Moore,* 73 Wash. App. 805, 871 P.2d 1086 (1994); *State v. Canady,* 116 Wn.2d 853, 857 (1991); *In re Eng,* 113 Wn.2d 178, 776 P.2d 1336 (1989); *In re Cloherty,* 2 Wash. 137, 27 P. 1064 (1891). Therefore, an allegation that statutory procedures were not followed raises a significant question about a court's legitimacy. (Such questions do not arise about courts of general jurisdiction, since they are created by the state constitution itself, not by the action of local legislative bodies.)

The plurality decision in *Heck* rested upon the premise that §1983 claims by state prisoners were most analogous to the tort of malicious prosecution when the Civil Rights Act of 1872 was adopted. *Heck v. Humphrey,* 512 U.S. 477 (1994). The justices left room for exceptions, however. Justice Thomas' vote was necessary to make Justice Scalia's opinion a plurality, and Justice Thomas stated that he joined because the result in *Heck* was consistent "with the state of the common law at the time §1983 was enacted." Id., p. 397.

The law of torts in 1871 held that trial by an illegal court was a trespass, not a malicious prosecution. In fact, according to Bouvier's Law Dictionary, 1870 edi-

tion (an official dictionary sanctioned by Congress nearest in time to passage of the civil rights act), an essential element of malicious prosecution is prosecution in a "regular proceeding".

> "*Malicious Prosecution.* A wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result."

and,

> "The proceedings under which the original prosecution or action was held must have been *regular,* in the ordinary course of justice, and before tribunal having power to ascertain the truth or falsity of the charge. [cite omitted] When the proceedings are irregular the prosecutor is a trespasser." (emphasis original) Bouvier's 1870 ed. v. II, pp. 92-93.

Congress has therefore known of the distinction between actions sounding in (or analogous to) malicious prosecution and those sounding in trespass, which is the tort committed when one is tried in an illegal court.

The courts were also aware of the distinction. In *Dynes v. Hoover,* 61 U.S. 838 (1857), the Supreme Court dealt with a court of limited jurisdiction (a court martial) that had not been properly constituted. The Court stated:

> "And it must have been with a direct reference to what the law was in England, that this court said, in *Wise v. Withers,* 3 Cranch. [331,] 337 [(1806)], that in such a case, 'the court and the officers are all trespassers.' " *Dynes v. Hoover,* p. 844.

Dynes v. Hoover, Id., was subsequently cited in *Runkle v. United States,* 122 U.S. 543 (1887) and in *McClaughry*

v. Deming, 186 U.S. 49, 63 (1902). See also *Bradley v. Fisher,* 13 Wall. (80 U.S.) 335, 351, 20 L.Ed. 646 (1871) (decided the year of passage of §1983; *Manning v. Ketcham,* 58 F.2d 948 (6th Cir. 1932); *Ryan v. Scoggin,* 245 F.2d 54, 58 (10th Cir. 1957); *Cox v. Perkins,* 299 Ky. 470, 185 S.W. 954, 173 A.L.R. 797 (1945).

Also, probable cause, reversed convictions and malice (necessary elements of malicious prosecution in most states, see *Fondren v. Klickitat County,* 79 Wash. App. 850, 860 (1995)) are irrelevant to the plight of someone tried in an illegal court. Since the sole premise of the present case is that the court was illegal, and therefore irregular, the application of any of the elements of malicious prosecution to this action is inappropriate.

It is Justice Scalia's opinion which states that to determine whether there is any bar to [a §1983] suit, "we first look to the common law of torts". *Heck,* p. 392. Presumably that common law will therefore be controlling. Examination of the law of torts in existence in 1871 shows that Congress and the courts both recognized that malicious prosecution could not be a remedy for one tried in an illegal tribunal, since the tribunal proceedings were not regular, and the elements of malicious prosecution, i.e., lack of probable cause, etc., are irrelevant to what must be proven.

Rather, the common law of torts in 1871 held that a claim for damages for trial by an illegal tribunal is governed by the tort of trespass. The one element of malicious prosecution utilized in *Heck* to limit §1983 claims by state prisoners, a prior favorable termination of conviction, is completely irrelevant to the question of a court's legal creation. A court's legal formation is completely independent of the guilt or innocence of the

defendant, independent of probable cause, malice and any other issue germane to malicious prosecution.

While we are a litigious people, most people tried in a municipal traffic court could not afford the legal effort needed to discover whether the court was legally created or not. At the same time, most citizens and residents in this country come in contact with the judicial system, if at all, in local traffic courts. It should not be too much to ask for the only judicial bodies that the vast majority of people ever come in contact with to be required to be legally constituted. That is, after all, what they are asking of the people brought before them: to be lawful. To have to prove their innocence, or a malicious prosecution, before they can address the court's illegal status subverts the most fundamental notions of justice that we have.

Since a malicious prosecution claim could not proceed under any circumstance if the court in which the prosecution took place was illegal, see Bouvier's Law Dictionary, supra, then the application of *Heck* to the present case conflicts with the principles announced in *Heck*. The decision of the circuit court is therefore in conflict.

II.

PROCEEDINGS IN AN ILLEGAL MUNICIPAL COURT DO NOT LIE AT THE "INTERSECTION OF §1983 AND FEDERAL HABEAS RELIEF.

The three opinions written in *Heck* each asserted that the case "lies at the intersection of [§1983] and the federal habeas corpus statute. . . ." *Heck*, p. 396. Federal habeas relief, however, only applies to those "in custody pursuant to the judgment of a State court." Title 28 U.S.C. §2254(b).

Also, all of the opinions in *Heck* refer to claims by "state prisoners" as being the "type considered here." See *Heck*, p. 392. Also, the opinions variously refer to *Heck* claimants as "criminal defendants" and to the convictions as "criminal judgments", p. 393. As an example, Justice Thomas' opinion describes the conflict between federal habeas relief and §1983 as being "in the context of suits by state prisoners". Id., p. 397. However, the Petitioners here are not, nor have they ever been, "state prisoners", most have never been state "criminals" (merely local ordinance offenders), nor are they "confined" or concerned with the length of their "confinement".

Mr. Steele was only summoned to appear for two parking tickets, one of which was dismissed. Mr. Knapp had numerous charges of ordinance violations, about half of them later dismissed, but he was never confined as the result of a judgment of a "State court". The municipal court in question cannot be a "State court" since it does not enforce state laws: its jurisdiction is limited to enforcing municipal ordinances. RCW 3.46.030. Most of the potential class members have simply paid fines to the Respondent for traffic and parking offenses, now decriminalized in Washington State. See RCW 46.63.010-020.

Also, the present case is not dependent upon how any one person's case was prosecuted. In the most complete sense possible, the present claim is a general constitutional challenge that does not require review of any final state court, or other court, decision in a particular case. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983). And given the definition's in Bouvier's Law Dictionary above, it is doubtful that Congress intended to change the law on trespass for trial

in unduly constituted courts when it adopted the Habeas Corpus Act.

What application does the federal habeas statute have to these Petitioners and the potential class members? There is no application. Habeas relief is and was irrelevant to them. *Wright v. Bailey*, 544 F.2d 737 (4th Cir. 1976) *cert. den*, 434 U.S. 825 (1977) (violators of civil infractions not eligible for habeas relief); *Russell v. Pierre*, 530 F.2d 791 (8th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976) (same). If this case does not lie "at the intersection of §1983 and federal habeas relief", as *Heck* does, how can the rule announced in *Heck* apply here? It cannot. The ruling of the Circuit Court below therefore conflicts with *Heck*.

III.
THE ALLEGATIONS OF FRAUD IN THE COMPLAINT BRING IT WITHIN THE EXCEPTIONS ENUMERATED BY JUSTICE SCALIA.

The Petitioners' Complaint alleged fraud on the part of the Respondent:

> "19. Defendant's ultra vires operation of its sham court was and is conducted in bad faith and through fraud as follows: 1. The Defendant represented the sham court as an authentic court. 2. The authenticity of the court is material to the Plaintiff class members since they would not be required to submit to the authority of a sham court. 3. The representation was false in that the court was and is not legal or authentic. 4. The Defendant knew, or should have known, that the court was not authentic. 5. The Defendant intended that the Plaintiff class members should rely on its representation, look upon its sham court as authentic and submit to its authority. 6. Plaintiff class members were and are still generally unaware that the court is not legal or authentic. 7. Plaintiff class members relied on

> the representation that the court was authentic or, absent coercion, they would not have dealt with it. 8. Plaintiff class members have a right to rely on the Defendant City's representation that its court is authentic. 9. Plaintiff class members have been damaged by loss of property and/or liberty taken from them while they were relying on the Defendant's misrepresentation that the court is authentic and had the authority to do so." Plaintiffs' Complaint, Para. 19.

These allegations are the elements of fraud required in Washington State. *North Pacific Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wash. App. 228, 628 P.2d 482 (1981), review denied, 96 Wash. 2d 1002 (1981).

In discussing some of Justice Souter's concerns, Justice Scalia wrote that:

> ". . . there must be exceptions to the rule [that conviction was irrebuttable proof of the existence of probable cause] in cases involving circumstances such as fraud, perjury, or mistake of law." *Heck* at p. 394.

The Third Circuit in *Mosely v. Wilson*, 102 F.3d 85 (3rd Cir. 1996) took this language at face value and recognized fraud as an exception to the application of *Heck*, which the courts below did not. The decisions below therefore conflict with both *Heck* and *Mosely v. Wilson*.

IV.

WHERE THERE ARE NO CRIMINAL JUDGMENTS, THERE CAN BE NO APPLICATION OF *HECK*.

The traffic and parking offenses administered by the city's court have been de-criminalized in Washington State. RCE 46.63.010-020. *Confederated Tribes of the Colville v. Washington*, 938 F.2d 146 (9th Cir. 1991). Thus, Mr. Steele has never been a state prisoner nor had

a criminal conviction. He has never been "in custody" or eligible for federal habeas relief. Justice Scalia stated in *Heck* that:

> ". . . if the district court determines that the plaintiff's action, even if successful, *will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff,* the action should be allowed to proceed in the absence of some other bar to the suit." *Heck v. Humphrey,* p. 394-395. (Emphasis added.)

This statement must be explanatory of the holding of the court, otherwise it could have no meaning. Therefore, no one convicted of a mere civil infraction, such as Mr. Steele and Mr. Knapp have been, can be subject to the restriction imposed by *Heck.* The claim of a person with no "outstanding criminal judgment" against him or her should, as Justice Scalia states, "be allowed to proceed". The decision of the circuit court below conflicts with this provision of *Heck.*

V.

PERSONS ACQUITTED OF CHARGES IN THE COURT OF LIMITED JURISDICTION CHALLENGED HEREIN SHOULD BE ALLOWED TO PROCEED IN THEIR ACTION AGAINST THE RESPONDENT.

The entire point of *Heck* was that a "conviction" must be reversed before a §1983 claim can proceed. Where a person is tried in an illegal court and acquitted, *Heck* does not preclude his or her suit claiming damages for the constitutional violation incurred (i.e., being summoned, charged and tried), since no conviction exists to be reversed. This should go without saying. *Burnham v. Superior Court of California,* 495 U.S. 604 (1990) (proceedings in a court lacking jurisdiction are coram non judice and void ab initio).

However, both Mr. Steele and Mr. Knapp had charges against them dismissed. How can they be precluded from a §1983 action to recover damages (as the lower court has done here) because of the rule announced in *Heck*. *Heck* simply does not apply in these instances, unless their other, unrelated and distinct parking or traffic convictions eliminates their standing. No known laws or cases suggest such a rule of standing. One cannot lose one's standing for one claim (based on an acquittal), merely because other, unrelated and unconnected charges have resulted in convictions in the same illegal court (we hope).

The lower court's application of *Heck* to the Petitioner's claims based on being tried and acquitted of charges conflicts with the tenets of *Heck*.

VI.
PAYMENT OF FINES FOR MISDEMEANOR OFFENSES, NOT RESULTING IN CONFINEMENT (JAIL), DOES NOT PRECLUDE A CLAIM UNDER *HECK*.

It is without dispute that a *Heck* claim involves a conflict between §1983 claims and claims that must be brought under the federal habeas corpus statute. But where a person is convicted of an ordinance misdemeanor offense, such as Mr. Knapp, and has only been required to pay fines, he or she is never confined and therefore never eligible for federal habeas relief. *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982) (in order to be eligible for habeas relief one must be in custody). One's claim for damages on account of being tried by an illegal court cannot be precluded by *Heck*, since the claim creates no conflict with the federal habeas corpus statute.

In other words, the many references to conflict between §1983 and the federal habeas corpus statute either mean what they say they mean or they do not. There might be

other prohibitions against collateral attack that may apply here, but the rule in *Heck* does not. *Heck* does not purport to be a generalized prohibition against collateral attack, it only holds that criminal convictions must be reversed before a §1983 claim is cognizable. *Heck* is therefore only one type of prohibition against collateral attack.

Traditionally, the judgments of a justice of the peace (such as the municipal court here), which is not a court of record, were subject to collateral attack, i.e., see *Parke v. Raley*, 506 U.S. 20, 29 (1992) (judgments lacking jurisdiction are subject to collateral attack – cited by *Heck*). The *Heck* opinion expressed concern about expanding "opportunities for collateral attack", but one cannot expand that which is already entirely open. *Heck* makes no statement evincing an intention to confer immunity where it did not exist or to otherwise change the law applicable to inferior courts.

State law on collateral attack, or claim preclusion, applies in federal court actions (*Valley Wood Preserving v. Paul*, 785 F.2d 751 (9th Cir. 1986)), so that would be a major shift. Washington State law says that a municipal court is a court "not of record" (*State ex rel. McFerran v. Justice Court of Starr*, 32 Wn.2d 544, 202 P.2d 927 (1949)) and collateral attack is always available on judgments of courts not of record. *Runkle v. U.S.*, 122 U.S. 543, 30 L.Ed. 1167, 7 S.Ct. 1141 (1887); *Junkin v. Anderson*, 12 Wn.2d 58, 120 P.2d 548 (1941) (No presumption in favor of jurisdiction of inferior court in collateral proceeding). Although *Heck* certainly affords some immunity from collateral attack, it should be interpreted to respect existing state law and not artificially inject immunity if state law holds to the contrary.

Therefore, the decision below, applying the rule in *Heck* to Mr. Knapp, and other potential class members who merely paid finds for misdemeanor ordinance violations, was error and conflicts with *Heck* itself.

VII.

CLASS MEMBERS JAILED FOR CITY ORDINANCE VIOLATIONS DO NOT LOSE THEIR RIGHT TO SUE FOR DAMAGES UNDER §1983 AS A RESULT OF *HECK*. (THIS IS THE "REAL LIFE EXAMPLE" OF WHICH JUSTICE SCALIA SPOKE IN FOOTNOTE 10 OF *HECK*.)

As was first argued above, the basis for a claim for trial by an illegal court is the tort of trespass, not malicious prosecution. One cannot sue for being maliciously prosecuted in an illegal court, since the tort of malicious prosecution requires trial in "regular proceedings". See Bouvier's Law Dictionary, above.

Therefore, even being jailed by the illegal municipal court does not give rise to application of the rule in *Heck*, and the lower court's dismissal of the Petitioners' claim therefore conflicts with *Heck* itself.

CONCLUSION

This Court's decision in *Heck v. Humphrey* applies exactly where it says it applies; at the intersection of §1983 and federal habeas relief. By applying *Heck* to municipal ordinance cases, civil infractions, the payment of fines for misdemeanors, and even to claims by acquitted individuals, the circuit court creates a conflict with

this Court, with the principles and rationales set forth in *Heck* and with the decisions of other circuits. Review of the circuit court's decision is therefore appropriate and essential for the proper administration of justice.

Respectfully submitted,

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October 1, 1997

APPENDIX A

[Filed MAY 14 1997]

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35102

D.C. No. CV-95-00226-AAM

RON STEELE, individually and as a class representative;
TERRY KNAPP, individually and as a class representative,

Plaintiffs-Appellants,

v.

CITY OF WALLA WALLA,

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Argued and Submitted May 7, 1997
Seattle, Washington

Before: LAY,** BEEZER and TROTT, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

In accordance with the rule set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), this case is dismissed.

APPENDIX B

[Filed JUL -3 1997]

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35102

D.C. No. CV-95-00226-AAM

RON STEELE, individually and as a class representative; TERRY KNAPP, individually and as a class representative,

Plaintiffs-Appellants,

v.

CITY OF WALLA WALLA,

Defendant-Appellee.

ORDER

Before: LAY,** BEEZER and TROTT, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Trott votes to reject the suggestion for rehearing en banc and Judges Lay and Beezer so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SPOKANE DIVISION

Case No. CS-95-0226 AAM

(CLASS ACTION COMPLAINT BY
PLAINTIFFS STEELE AND KNAPP)

RON J. STEELE and TERRY KNAPP,
individually and as class representatives,

Plaintiffs,

vs.

CITY OF WALLA WALLA,

Defendant.

CLASS ACTION COMPLAINT
FOR PERMANENT INJUNCTIVE AND
DECLARATORY RELIEF AND
DAMAGES INCIDENT TO EQUITABLE RELIEF

Plaintiffs RON J. STEELE and TERRY KNAPP, on behalf of the members of the class, due Defendant, CITY OF WALLA WALLA, and state as follows:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343, providing for jurisdiction without regard to the amount in controversy in cases seeking redress from alleged infringements of civil rights; pur-

suant to 28 U.S.C. Section 1343, providing for jurisdiction in cases arising under the Constitution and laws of the United States; and pursuant to 28 U.S.C. Sections 2201 and 2202, providing for declaratory and injunctive relief. This cases arises under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983, creating a federal cause of action for violations of these civil rights.

2. The purpose of this action is to obtain a declaration that the purported court of limited jurisdiction that has been and continues to be operated by the Defendant is not and has not been a court since July, 1976; and is void, nonexistent, fraudulent, a nullity and a trespasser; to permanently enjoin the operation by the Defendant of this purported court until the Defendant complies with the law in the creation and operation of a legally constituted court of limited jurisdiction; and as an incident thereto to recover from the Defendant damages for the deprivations of liberty and property suffered by members of the Plaintiff class, which were taken without due process of law. The Plaintiff class is asking whether government may violate the law in creating a court whose function is to take property and/or liberty from citizens when those citizens violate the law.

3. The named Plaintiffs are residents of the County of Walla Walla, State of Washington.

4. The Defendant is a municipality organized under the laws of the State of Washington.

CLASS ACTION ALLEGATIONS

5. This action is brought by Plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23(b)(1) and/or

23(b)(2) of the Federal Rules of Civil Procedure, for injunctive and declaratory relief and damages and other relief incident and subordinate thereto, including costs and attorney fees. Plaintiffs are entitled to bring this action on their own behalf and on behalf of all others who have a common right and interest in protection against further illegal deprivation of property or liberty by Defendant through its unlawful and fraudulent operation of an illegal, invalid, void and improperly constituted court of limited jurisdiction.

6. The class so represented by Plaintiffs in this action and of which Plaintiffs are members, consists of those persons who have been summoned, arrested, prosecuted, jailed, imprisoned, detained, fined or charged with any costs, fees, penalties or forfeitures by action of the purported, but sham court of limited jurisdiction conducted and operated by the Defendant since July, 1976.

7. The exact number of members of the class, as herein identified and described, is not known, but it is estimated that there are not less than 10,000 members. As a result, the class is so numerous that joinder of individual members herein is impractical.

8. There are questions of law and fact in this action that affect the rights of each member of the class, and the relief sought is common to the entire class: a declaration that the purported court of limited jurisdiction operated by the Defendant is not a court, has been void, fraudulent, a nullity and a trespasser since July, 1976, under the laws of the United States and the State of Washington, and that Defendant has under color of local or state law unconstitutionally deprived the members of the class of property and liberty without true, lawful authority or the due process of law together with an injunction restraining any further operation of the pur-

ported court and, as an incident to the above, damages under 42 U.S.C. Section 1983 for violation of their civil rights.

9. In 1975, the City of Walla Walla petitioned the County of Walla Walla (hereinafter the "County") to amend the existing Justice Court Districting Plan (the "Plan") to create a municipal department of the Walla Walla Justice District Court, a matter solely within the County's, not the City's, jurisdiction. The applicable statute, RCW 3.46, is one of several in the Code permitting municipalities which follow certain mandatory procedures to operate municipal courts. In this case, the statute required that the County undertake specific procedural steps and then take substantive, official action before the Plan could or would be amended and the municipal department be thereby created. These steps and actions included, but are not limited to, holding public hearings, notification to the public of the date and time of the hearings, and substantive action in the form of a majority vote at a public hearing by the County Commission to approve an amendment to the currently existing Plan, which had been previously adopted by a Resolution of the County on September 25, 1967, and had been effective since January 1, 1968. However, the County never undertook or provided such mandatory hearings, notice to the public and especially never took any action or vote whatsoever approving or authorizing an amendment to the existing Justice Court Districting Plan or the creation of any additional court or municipal department of the Walla Walla Justice District Court.

10. In spite of the failure and/or refusal of the County to grant in any way the Defendant's Petition or to amend the existing and substantively approved Justice Court Districting Plan so as to create a municipal department,

the Defendant commenced, ultra vires, to operate a purported but sham, illegitimate and fraudulent municipal court as a department of the Walla Walla Justice District Court in July, 1976. Defendant has operated this purported, sham court continuously since then in order to provide revenue to itself and to enforce Defendant's city ordinances and traffic regulations by fine and/or imprisonment of the citizens. Acting through said court, Defendant has, in bad faith, fraudulently and without true or lawful authority, summoned, arrested, prosecuted, jailed, imprisoned, detailed, and coercively extracted fines, costs, fees and other penalties and forfeitures from Plaintiffs and other members of the class. Defendant has coercively extracted the property of Plaintiff class members, totalling more than $4,000,000, and utilized their property as its own, and has in other ways harassed Plaintiff class members, all in violation of the Fifth and Fourteenth Amendments to the United States Constitution, for which a remedy is made available in 42 U.S.C. Section 1983.

11. The claims of Plaintiffs who are representatives of the class herein are typical of the claims of the class, in that the claims of all members of the class, including Plaintiffs, depend upon the showing of the acts or omissions of Defendant to give rise to the right of Plaintiffs to the relief sought herein. There is no conflict as between any individual named Plaintiff and other members of the class with respect to their action or with respect to the claims for relief herein set forth. Plaintiffs, as have all other members of the class by definition, been summoned, detained, fined and/or imprisoned and been otherwise harassed and deprived of property and liberty, all as a result of the acts of the purported, but void, null and ultra vires, municipal court knowingly and fraudulently operated by the Defendant.

12. The prosection of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendant.

13. The prosection of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

14. The Defendant has acted and continues to act on grounds uniformly and universally applicable to the class, and by reason of such conduct, thereby made appropriate final injunctive and declaratory relief with respect to the class as a whole or corresponding declaratory relief with respect to the entire class, as sought in this action.

15. The named Plaintiffs are the representative parties for the class and are able to and will fairly and adequately protect the interests of the class inasmuch as they have been greatly aggrieved by the Defendant, have reviewed the facts and the law themselves, have labored to obtain suitable counsel and are persistent and untiring in their pursuit of justice in this matter. The attorney for Plaintiffs is experienced and capable in the field of civil rights litigation and municipal law and in particular in the litigation of class actions involving the civil rights of defendants summoned unlawfully before courts of limited jurisdiction, and has successfully represented claimants and defendants in other litigation of this nature. This undersigned attorney, David W. Rynders, will actively conduct and be responsible for Plaintiffs' case herein.

16. Plaintiffs have no other remedy at law in that Defendant continues in bad faith to operate its purported, but null, void and fraudulent court, continues to summon and arrest persons, to fine and imprison them and to charge them with costs, fees and other penalties and forfeitures. Defendant has refused to cease, stop, remedy or correct these flagrantly and patently ultra vires actions after repeated requests. Plaintiffs and other class members, together with thousands of other persons, are threatened with irreparable injury in the form of being further summoned, arrested, prosecuted, jailed, imprisoned or detained by Defendant's ultra vires acts unless granted the relief prayed for herein.

17. There are now undoubtedly pending prosecutions in Defendant's ultra vires court; but the Defendant continuously prosecutes by means of this illegitimate court; and there will never be any time or occasion when this is not the case. If Plaintiffs are barred by such pending prosecutions, before a null and void court having no jurisdiction whatsoever, no relief or remedy would ever be available to Plaintiffs or the class or anyone in the future apprehended by this sham court.

18. Action by Defendant constitutes state action within the meaning of the Fourteenth Amendment to the Constitution of the United States. The acts and omissions of Defendant under color of local or state law have deprived Plaintiffs of their Fifth and Fourteenth Amendment rights and amount to a substantive, constitutional denial of their rights. Defendant's acts and omissions are a subversion of the processes of justice: not a mere error or procedural irregularity, but constitute pretended judicial action totally without jurisdiction.

19. Defendant's ultra vires operation of its sham court was and is conducted in bad faith and through fraud as

follows: 1. The Defendant represented the sham court as an authentic court. 2. The authenticity of the court is material to the Plaintiff class members since they would not be required to submit to the authority of a sham court. 3. The represenation was false in that the court was and is not legal or authentic. 4. The Defendant knew, or should have known, that the court was not authentic. 5. The Defendant intended that the Plaintiff class members should rely on its representation, look upon its sham court as authentic and submit to its authority. 6. Plaintiff class members were and are still generally unaware that the court is not legal or authentic. 7. Plaintiff class members relied on the representation that the court was authentic or, absent coercion, they would not have dealt with it. 8. Plaintiff class members have a right to rely on the Defendant City's representation that its court is authentic. 9. Plaintiff class members have been damaged by loss of property and/or liberty taken from them while they were relying on the Defendant's misrepresentation that the court is authentic and had the authority to do so.

20. The Plaintiff class members have suffered an additional, non-monetary injury: Trust and confidence in the authenticity of public institutions is an important factor in the peaceful enjoyment of peoples' lives, an element of their right to the pursuit of happiness. For instance, people trust that they will never be summoned before a court that is not itself, at the very least, lawfully established. They trust that if their property or liberty is taken, it is by a court which is itself authentically created by substantive acts pursuant to due cess of law. The judiciary has provided society with more than just the rule of law: it has insured a social stability unknown in history and at the same time encouraged the

loyalty of the opposition. Trust in the authenticity of the courts is unquestioned. Such trust is also, however, a personal, valued possession of each citizen, including Plaintiff class members. This applies with special significance to courts of limited jurisdiction like traffic courts, because the vast majority of people only come into contact with these courts. A loss of trust in a court's authenticity by a large class of persons, such as Plaintiff class members, is calamitous and therefore always an extraordinary circumstance. Defendant's ultra vires operation of a fraudulent court has injured that trust and threatens immediate and irreparable harm to Plaintiffs and others because it invites the perception among people that government can violate the law with impunity while mere individuals cannot. This perception gives substance to the fear that law is a matter of who has power and not who has rights. This fear, in turn, invites the actual exercise of power and not rights; and therefore, because of this fear, Plaintiffs' enjoyment of life and the peaceful pursuit of happiness is lost. From this substantive injury, Plaintiffs seek relief.

WHEREFORE, Plaintiffs request for themselves and all other members of the class that:

1. The rights of the class members, to wit: to a declaration that the operation of a purported court of limited jurisdiction by the Defendant since July, 1976, has been unlawful, unconstitutional, fraudulent, null, void and a trespass, be adjudicated and declared; and

2. The Defendant be permanently restrained and enjoined from operating its illegal and fraudulent sham court until a lawful municipal court is created; and

3. Plaintiffs be awarded attorneys fees pursuant to 42 U.S.C. Section 1988; and

4. Plaintiff class members be awarded damages incident to the equitable relief requested, in the form of a return of the property, fines, fees and other penalties and forfeitures taken from or imposed on them and together with compensation for being summoned, arrested, prosecuted, jailed, imprisoned or detained, all without due process of law; and

5. Plaintiffs have such other and further relief as to the court may seem appropriate, including costs and expenses.

DEMAND FOR JURY TRIAL

Trial by jury is demanded in the above-titled case.

RON J. STEELE

Plaintiff

TERRY KNAPP

Plaintiff

Respectfully submitted,

David W. Rynders
Trial Counsel for Plaintiff
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APPENDIX D

[Filed DEC 18 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-0226-AAM

RON J. STEELE and TERRY KNAPP,
individually and as class representatives,

Plaintiffs,

v.

CITY OF WALLA WALLA,

Defendant.

ORDER ON MOTION
AND
CROSS-MOTION FOR SUMMARY JUDGMENT

Before the court is defendant's motion for summary judgment, Ct. Rec. 22, and plaintiffs' cross-motion for summary judgment, Ct. Rec. 43. On hearing without oral argument, plaintiffs were represented by David Rynders of Naples, Florida. Defendant was represented by John Schultz and George Fearing of Leavy, Schultz, Davis and Fearing, Kennewick, Washington. Upon consideration of the record and the arguments presented by counsel, the court enters the following order.

Plaintiffs filed suit in this court under 42 U.S.C. Sec. 1983 (§ 1983), alleging due process violations of the Fifth and Fourteenth Amendments. Plaintiffs contend

that the Walla Walla municipal court was never properly established or ratified, and the city of Walla Walla violated plaintiffs' rights by maintaining an invalid court that issued arrest warrants and fined plaintiffs, thus infringing upon their liberty and property interests without due process of law. Defendant counters that the municipal court was properly authorized. Additionally, defendant argues that plaintiffs are precluded from bringing a § 1983 claim in federal court because they were not denied procedural due process, they failed to exhaust state remedies, and finally, that plaintiffs are estopped from challenging the municipal court's authority under the doctrine of res judicata.

The parties bring cross-motions for summary judgment. For the reasons set forth below, the court grants defendants' motion and denies plaintiffs' motion.

I. FACTS

The following facts are taken from the parties' Local Rule 56 statement of material facts (Plaintiffs' Ct. Rec. 46; Defendants' Ct. Rec. 24). Pursuant to LR 56(c), any material fact stated by a moving party and not rebutted by the non-moving party is deemed admitted. Upon a thorough review of all of the facts on the record, the court finds only the following to be material to the resolution of this motion.

In 1974 and 1975, the city and county of Walla Walla ("City" and "County," respectively) began contemplating the establishment of the Walla Walla municipal court as a department of the Walla Walla District Court, as provided by RCW 3.46. In late 1975, the City petitioned the Walla Walla County Board of Commissioners and requested that the municipal court become a department of the district court. The Board

referred the petition to the County Districting Committee. Apparently, no formal action of the Board or County ratifying the municipal court was recorded.

Since 1976, the County has prepared and adopted yearly budgets with the assumption that the City will pay a portion of the municipal judge's salary.

In 1993, in response to a claim that the court lacked jurisdiction, a municipal court judge found that the municipal court was not properly established as a department of the County district court. After the 1993 challenge, the Board of Commissioners formally adopted a resolution that ratified the municipal court as a department of the district court, apparently without a new petition from the city and without public hearing. The Board declared the resolution retroactive to July 1, 1976.

In 1994, plaintiff Ron Steele challenged the status of the Walla Walla municipal court. Steele moved to dismiss the municipal charges against by asserting the municipal court had never been properly established under state law.

Plaintiffs Knapp and Steele owe unpaid fines imposed by the municipal court for violations of City ordinances. Knapp has been cited for 55 separate infractions, with 23 dismissed. The superior court recently dismissed Knapp's pending appeals due to the failure to prosecute. Steele has no appeals pending.

II. STANDARD FOR SUMMARY JUDGMENT

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975). A party is entitled to summary judgment where the documentary

evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 (1986); *Semegen v. Weidner*, 780 F.2d 727 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In ruling on a motion for summary judgment all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex*, 477 at 322-23.

III. ANALYSIS

To state a claim under § 1983 a person must allege the violation of a right secured by the Constitution and laws the United States, and must show that the alleged deprivation was committed by a person acting under the

color of state law.[1] *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). There is no dispute that the defendant was acting under the color of state law; rather, the primary issue is whether plaintiff can establish evidence that the defendants caused a violation of constitutional significance.

Plaintiffs contend that the city's maintenance of an allegedly invalid court deprived them of liberty and property without procedural due process, thus violating the Fourteenth Amendment.

A. Municipality Liability

Plaintiffs are suing the City for asserted deprivations of their procedural due process rights. Municipalities are considered "persons" for purposes of § 1983 claims, but only if "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. New York City Dept. of Soc. Services*, 436 U.S. 658, 691 (1978).

The first inquiry in a case alleging municipal liability under § 1983 is whether a "direct causal link" exists between a municipal policy and the alleged constitutional

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[1] The text of § 1983 states:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

deprivation. *Canton v. Harris*, 489 U.S. 378, 385 (1989). To satisfy the causal requirement, plaintiffs must show that the city's policy, or the execution of that policy, was "the moving force" behind their alleged constitutional violations. *Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985) (citing *Monell v. New York City Dept. of Soc. Services*, 436 U.S. 658, 691 (1978)). Furthermore,

> [t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

Plaintiffs have shown no causal link whatsoever between the city's petition to the County for creation of a municipal court or the maintenance, by providing a portion of the judge's salary, of the municipal court, and the alleged deprivations of procedural due process.[2] Plaintiffs continually assert that the County failed to properly ratify the court because no notice or public hearing was provided; they do not allege that the City failed to take such action. Nor do plaintiffs allege, and the court doubts if they could, that the City's policies of requesting and funding the municipal court were the "moving force" behind the court's alleged invalidity that is the basis of their claim. The municipal court is a department of the County district court; the City merely pays a portion of its costs.

Further, it strains the bounds of credulity to assert or believe that the City's petition or operations "set in

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[2] A decision by the legislative body of a municipality is considered "policy" for the purposes of § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

motion of series of acts by others," i.e., the Board of Commissioners omissions and the court's subsequent rulings, that the City knew or reasonably should have known would cause the alleged deprivations suffered by plaintiffs.

Finally, it is questionable whether any governmental policy caused plaintiffs alleged injuries. Plaintiffs were not hauled into municipal court by the City or the County; plaintiffs were required to appear and assessed finds because they violated the City's ordinances, a fact that plaintiffs do not contest. Plaintiffs affirmatively declare that they are not challenging any court ruling, municipal ordinance or state law. Plaintiffs have not shown that the City caused their alleged deprivations of due process, and therefore, their § 1983 claim is barred.

B. Procedural Due Process

Plaintiffs also fail to assert an injury of constitutional significance. In the complaint, plaintiffs claim appeared to be that the City violated their rights of procedural due process, in that it failed to follow proper procedures when establishing the municipal court. Subsequently, plaintiffs declared that the City violated their rights of substantive due process. Although the court finds that plaintiffs did not allege a violation of substantive due process in their complaint, the court will address both claims.

In procedural due process claims, the deprivation of a constitutionally protected interest by a person acting under the color of state law is not in and of itself unconstitutional. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). The constitutional violation occurs when the party is deprived of such interest without due process of law. *Id.*; *Carey v. Piphus,* 435 U.S. 247, 259 (1978).

Accordingly, "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon* at 126. To determine whether a violation occurred, a court must inquire into the procedural safeguards provided by the statutory procedure effecting the deprivation as well as any remedies for erroneous deprivation. *Id.*

An examination of the state procedures provided during municipal court hearings and after such hearing show that the state's procedures provided plaintiffs with adequate due process.

First, plaintiffs were provided adequate procedures in municipal court. They were provided notice and the opportunity to be heard. Plaintiff Steele, in fact, brought a motion to dismiss a parking infraction on the basis that the court was invalid. He filed pleadings and presented oral argument in support of his motion before it was denied by the municipal court judge. *City v. Steele,* No. B-28064, (Mun. Ct. 1994). Therefore, plaintiffs were provided with adequate procedural due process prior to their deprivations.

Furthermore, plaintiffs have the opportunity to appeal a municipal court decision to superior court. RALJ 2.2, 2.3. Plaintiffs did not pursue this avenue of relief. Although plaintiff Knapp had several appeals dismissed, he only appealed a portion of his 55 infractions. Plaintiff Steele could have appealed the decision of the municipal court finding that the court was indeed valid. Yet he did not do so.

Finally, Washington state law provides a vehicle by which to challenge judgments void for lack of jurisdiction. Cr.R. 7.8; CR 60. Again, plaintiffs failed to file such a claim.

Plaintiffs, in a very cavalier fashion, contend that they are not required to file any action in state court, nor do they wish to do so "because their experience with state courts has not been promising, having been hauled before one illegal state 'court' already." Plaintiffs' Response to Motion for Summary Judgment at 2-3. However, plaintiffs did not attempt to remedy the alleged violations of state law in state courts. That, of course, is their choice. That choice now precludes plaintiff from claiming violations of procedural due process in federal court.[3]

In addition to the failure to show that the state did not provide adequate due process, plaintiffs have failed to show that the city's operation of a municipal court, even if improperly ratified by the county, violated their rights to due process under the Constitution of the United States. Due process requires that a state employ protective procedures before depriving a person of liberty or property, either pre- or post-deprivation, depending upon the interest involved and the risks of erroneous deprivation. *Mathews v. Eldridge,* 424 U.S. 319 (1976). Where injury is the product of state law, the state may not take away the protected interest without a pre-deprivation hearing. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1981); *Haygood v. Younger,* 769 F.2d 1350, 1357 (9th Cir. 1985). Accordingly, "[p]rocess which precedes a loss of liberty obviously prevents a constitutional violation." *Haygood* at 1357. Plaintiffs do not contest that they were provided with notice, hearing, and the opportunity to be heard before they were

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[3]Moreover, the issue of whether the municipal court lacked jurisdiction as a result of the County's action or inacttion is solely a matter of state law; it is not a matter of federal law. The state is entitled to determine the jurisdictional boundaries of courts operated pursuant to state law.

fined or arrested. What plaintiffs claim is that the city failed to recognize that the municipal court was not properly ratified, and therefore, the city violated their due process rights. Plaintiffs contention is without any legal foundation. Thus, this court is without jurisdiction to hear plaintiffs claim.

C. Substantive Due Process

In response to defendant's arguments that a violation of procedural due process had not occurred, plaintiffs suddenly claim that their rights to substantive, not procedural, due process were violated by the City. The court is offended by this flagrant attempt to avoid dismissal on the basis of a failure to allege a violation of procedural due process. A cursory review of the applicable caselaw would inform plaintiffs that this claim comes nowhere close to a substantive due process claim.

A violation of substantive due process "comprise[s] those acts by the state that are prohibited regardless of the fairness of the procedures used to implement them." *Wood v. Ostrander,* 879 F.2d 583, 589 (9th Cir.), *cert. denied,* 489 U.S. 938 (1989) (citing *Daniels v. Williams,* 474 U.S. 327, 331 (1986)). A city is not prohibited from creating a municipal court, nor is it prohibited from citing and fining those who violate municipal ordinances. Plaintiffs do not allege, nor did they suffer, violations of their due process rights.

IV. SANCTIONS

Defendant requested costs and attorney fees pursuant to 42 U.S.C. Sec. 1988 (§ 1988). The court finds it appropriate to award defendant costs and attorney fees; however, because this court has no jurisdiction to hear

this case, it has no jurisdiction to award attorney fees under § 1988. *See Branson v. Nott,* 62 F.3d 287, 293 (9th Cir. 1994). Nonetheless, a district court may award costs and fees against an unsuccessful plaintiff pursuant to Fed. R. Civ. P. 11 "only if the action is meritless, in the sense it is groundless or without foundation." *Elks Nat'l Foundation v. Weber,* 942 F.2d 1480, 1485 (9th Cir. 1991), *cert. denied,* 505 U.S. 1206 (1992) (internal quotes and citation omitted).

The court finds that plaintiffs' claims are without foundation. The defendant's actions in no way violated plaintiffs' rights of due process, and any attorney with an ounce of common sense or legal experience would recognize that these claims do not reach the level of constitutional violations. Furthermore, plaintiffs did not diligently attempt to appeal any adverse ruling in the state courts. Finally, plaintiffs' briefs were completely devoid of merit or foundation with respect to constitutional violations. They attempted to cloak the lack of any legal basis with extensive discussions on the importance of civil rights, due process and the federal courts, including a tedious discussion of legal history with quotes from Abraham Lincoln! And all because the County, allegedly, did not properly ratify the municipal court in a public hearing.

V. CONCLUSION

The court finds that the plaintiffs' have not shown that the City of Walla Walla caused their deprivations, nor have they alleged a constitutional violation. Therefore, the court is without jurisdiction to hear plaintiffs' claims. Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is **GRANTED**, and that plaintiff's cross-motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that plaintiffs' complaint is **DISMISSED** with **PREJUDICE**.

In reaching its decision, the court did not reference disputed affidavits. Therefore,

IT IS FURTHER ORDERED that plaintiffs' motions to strike portions of affidavits, **Ct. Recs. 33, 40**, are **DENIED** as **MOOT**.

The court finds that plaintiffs' claims are meritless. Accordingly,

IT IS HEREBY ORDERED that plaintiff shall **SHOW CAUSE** by March 11, 1996, why sanctions – including but not limited to fines, attorney fees, and costs – should not be imposed against plaintiffs and counsel. Defendant shall, by March 1, 1996, submit an itemized list of costs and attorney fees.

IT IS FURTHER ORDERED that plaintiffs' counsel shall **APPEAR** in person on March 11, 1996, at 10:30 a.m. in Yakima, and **SHOW CAUSE** why his privilege of appearing before this court should not be suspended or withdrawn.

IT IS SO ORDERED. The Clerk is instructed to enter this Order and forward copies to counsel. The Clerk is further instructed to enter an Order of Judgment and forward copies to counsel.

DATED this 18th day of December, 1995.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States District Judge